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Supreme Court of the United States

OCTOBER TERM, 1952

No. 761

ANTHONY MOLLICA,

Plaintiff-Appellee,

against

COMPANIA SUD-AMERICANA DE VAPORES sued herein as "CHILEAN LINE", also known as SUD-AMERICANA DE ZAPORES OF VALPARAISO,

Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

EDMUND F. LAMB,
80 Broad Street,
New York 4, N. Y.
Attorney for Petitioner.

VINCENT A. CATOGGIO,
of Counsel.

Bowne & Co., Inc., 163 Front Street, New York 38

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Supreme Court of the United States

OCTOBER TERM, 1952

ANTHONY MOLLICA, *Plaintiff-Appellee,* vs. COMPANIA SUD-AMERICANA DE VAPORES sued herein as "CHILEAN LINE", also known as SUD-AMERICANA DE ZAPORES OF VALPARAISO, *Defendant-Appellant.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Judges of the Supreme Court of the United States:

Petitioner, Compania Sud-Americana de Vapores, prays that a Writ of Certiorari be issued to review the final decision and judgment of the United States Court of Appeals for the Second Circuit filed February 2nd, 1953, affirming a final judgment entered in the United States District Court for the Southern District of New York on June 9th, 1952 in favor of the plaintiff, Anthony Mollica, against the defendant Compania Sud-Americana de Vapores in the amount of $27,500 with costs.

The opinion of the Court of Appeals (R. 153-158), with a dissenting opinion by Chief Judge SWAN is reported at 202 F. (2d) 25. The opinion of the District Court denying petitioner's motion for judgment notwithstanding the verdict (R. 134, 137), is reported at 107 Fed. Supp. 316.

Jurisdiction.

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (Sec. 240 (a)) of the Judicial Code as amended by the Act of February 13th, 1925, Ch. 229, Sec. 1).

The judgment of the Court of Appeals affirming the judgment of the United States District Court for the Southern District of New York was entered on February 2nd, 1953 (R. 158) and petition for rehearing (R. 163) was denied on March 10, 1953 (R. 186).

Summary Statement.

The plaintiff, a longshoreman in the employ of Pittston Stevedoring Corporation (a New York Corporation), was injured on August 18th, 1949 in the lower No. 4 hold of the S/S *Aconcaqua,* owned and operated by the petitioner (a foreign corporation) which plaintiff's employer was loading with cargo. A case of automobile parts wedged in between other cases and the ship's shaft tunnel, which plaintiff was endeavoring to free and stow properly, came partly down onto plaintiff's heel as he knelt and it caused serious injuries to plaintiff's foot. The ship lay moored afloat at 57th Street, Brooklyn, New York at the time of this occurrence.

Plaintiff's employer had commenced loading of this ship in the morning of the day before the instant occurrence and loading of No. 4 hold, where plaintiff was injured, was started on the day of the accident at 8:00 A.M. Work continued in this hold up to 6:00 or 6:15 P.M. when the day gang knocked off. The plaintiff came to work at 7:00 P.M. and he was injured at about 7:25 P.M. The gang which worked this hatch up to 6:00 or 6:15 P.M., left the hatch open and uncovered (2 Cir. opinion R. 156) and the wedged in case which was suspended at one end about two or three feet from the bottom of the hold was "still

resting in the cable fall from the ship's boom by which it was being lowered when it became so wedged" (2 Cir. opinion (154). The stevedore day gang had left pinch bars and dog hooks in the hold (R. 54).

In the language of the Court of Appeals the plaintiff sustained his injury as follows:

> "The appellee was one of the night gang of stevedores that began work at seven o'clock in the evening. He went into the hold and, on seeing the wedged case, he set about to drag away the case on which it rested so that the wedged case would fall and rest flat on the bottom of the hold. In so doing, he used a cable from a boom other than the one in whose cable the wedged case still rested, rigged up a drag line through a snatch block attached to the bulkhead, and connected this drag line to dog hooks which he held against the supporting case. The supporting case was to be pulled out of the way by power slowly supplied from the boom, and the appellee intended to hold the dog hooks against the case until, and apparently only until, the slack on the drag line was taken up. He gave the signal for taking the cable up slowly to the hatch boss who was standing on the tunnel, and the hatch boss relayed it to the winchman orally and by hand signals. When the power was applied, the supporting case was dragged out of the way, and one end of the wedged case, which consequently fell the two or three feet to the bottom of the hold, landed on the appellee's left foot causing the injuries for which he sued" (R. 154).

The suit originated as one sounding in negligence, but, as the Court of Appeals points out (R. 157), at the end of the plaintiffs case he expressly abandoned negligence and put his whole reliance on the charge of unseaworthiness (R. 95).

When plaintiff amended and changed the theory of his suit it was on this statement:

> "The bases on which he presents his case is that a warranty of seaworthiness owed him by the defendant shipowner was breached in the respects of failure to provide a safe place to work, failure to provide sufficient and adequate illumination as required, and presenting a dangerously poised case down in the lower hatch, over which this shipowner had control just prior to the time this plaintiff came to work, all of which proximately caused the injuries to the plaintiff, from which he suffers, and on which this present suit is based" (R. 95).

The sole basis upon which the Court of Appeals sustained the verdict was that there was evidence from which the jury could have found that the hold was not adequately lighted and that additional lights would be needed and the mate had failed to see to it that the lampman set them out.

It is conceded that at the time the longshoremen began work at 8:00 A.M., the No. 4 hold was in seaworthy condition. There was testimony by the third mate of the ship that at some time between 5:00 and 7:00 P.M. he made a tour of inspection of the holds, including No. 4 hold (dissenting opinion SWAN, Chief Judge, R. 21 (b)).

The Trial Court denied the defendant's motion at the end of plaintiff's case to dismiss the complaint and at the end of the whole case for a directed verdict and submitted to the jury, among other questions of fact for them to decide:

> "Whether the ship or the stevedores had control of No. 4 hold during that forty-five minute period . . ." (R. 120)

between 6:15 P.M. when the day gang of stevedores knocked off and 7:00 P.M. when the plaintiff's gang started work.

After the jury returned its verdict the petitioner moved for judgment notwithstanding the verdict on the ground, among others, that as a matter of law, custody and control of No. 4 hold remained in the stevedores at least from

the inception of work at 8:00 A.M. on the day of this occurrence and that the vessel then was seaworthy. The Trial Court denied the motion with a written opinion (R. 134).

The Court of Appeals was divided in affirming the District Court's judgment. Chief Judge SWAN dissenting, expressed the view that as a matter of law the ship had not resumed control of the hold and that the motion for judgment notwithstanding the verdict should have been granted. The majority of the Court held that there was an issue of fact as to whether control reverted to the shipowner during the interval between 6:15 and 7:00 P.M.

The Court of Appeals filed its opinion and entered its judgment herein on February 2, 1953. On February 5th, 1953, the Third Circuit Court of Appeals reached a contrary result in *Lopez* v. *American-Hawaiian Steamship Co.*, 201 F. (2d) 418, unanimously affirming a judgment dismissing the complaint. The facts are almost identical in the two cases. In both there was loading of a vessel around the clock, a recess by stevedores, insufficient illumination and inspections of the holds by the Mate. The Third Circuit held as a matter of law that custody and control of the hold remained in the stevedores at all times.

A petition for reargument was filed herein on February 13th, 1953, in which attention of the Court was directed to the decision of the Court of Appeals for the Third Circuit in *Lopez* v. *American-Hawaiian Steamship Co.* The petition for rehearing was denied on March 4th, 1953.

On March 26th, 1953, the Court of Appeals for the Third Circuit rendered an opinion in the case of *Brabazon* v. *Belships Co. Ltd., Skibs, A/S* F. (2d) (not yet reported), also in conflict with the present decision, specifically holding that a failure by the ship to supply lights for the longshoremen to place where needed constitutes negligence, but not unseaworthiness.

The Questions Presented.

1. As a matter of law, when stevedores commence loading a hold of a ship at 8:00 A.M. and continue to 6:00 or 6:15 P.M. and then take a recess until 7:00 P.M., and the Mate of the ship during this interval inspects the cargo already loaded, does this inspection revert custody of the hold back to the ship and does a new warranty of seaworthiness as to the conditions in the hold arise when a new gang, employed by the same stevedores, resumes work at 7:00 P.M.?

2. Does a ship or a shipowner who in connection with a contract with a contracting stevedore for the stowage of cargo in the hold of a ship agrees to provide lights for use by the stevedores, breach its warranty of seaworthiness under the doctrine enunciated in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, if the ship's personnel, charged with the duty of laying out the lights, fails to make an adequate number of lights available?

3. Does knowledge by the Mate of a ship that additional light will be necessary in the hold for the loading of cargo at night render the ship unseaworthy if the Mate fails to order that adequate lights be set out?

4. If a day gang of stevedores creates a dangerous condition in the stowage of cargo and a night gang employed by the same stevedoring corporation is correcting the condition and one of its members is hurt by the condition, can the shipowner be held liable for the injury?

Reasons for Granting the Writ.

1. The decision of the Court of Appeals herein is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Lopez* v. *American-Hawaiian Steamship Co.,* 201 F. (2d) 418, in which the Court of Appeals for the Third Circuit held that the question whether custody

and control was in the ship or in the stevedore, was a question of law for determination by the Court.

2. The decision of the Court of Appeals herein is in conflict with the decision of the Court of Appeals for the Third Circuit in *Brabazon* v. *Belships Co. Ltd., Skibs, A/S,* decided on March 26th, 1953 F. (2d) (not yet reported). The Court of Appeals for the Third Circuit in that case held that an omission to supply lights as requested by the contractor does not constitute a breach of the warranty of seaworthiness. The present decision is also in conflict with the decision of the New York Court of Appeals in *Riley* v. *Agwilines,* 296 N. Y. 402 in which that Court applied the same principle as was later applied by the Third Circuit in *Brabazon* v. *Belships Co.,* decided March 26, 1953 F. (2d) (not yet reported).

3. The instant decision of the Court of Appeals creates new law inconsistent with prior decisions of that Court in *Lynch* v. *United States,* 163 F. (2d) 97 and *Lauro* v. *United States,* 162 F. (2d) 32, which held that the duty of seaworthiness does not extend to a condition created by the contractor; and the instant decision is in conflict with the prior decision in the Second Circuit in *Byars* v. *Moore-McCormack Lines,* 155 F. (2d) 587 and the decision of the Third Circuit in *Bruzewski* v. *Isthmian Steamship Co.,* 163 F. (2d) 750, Cert. den. 333 U. S. 828 which held that an employee of the contractor cannot recover for injuries received while doing an act to eliminate the cause of the injury.

4. The decision of the Court of Appeals enunciates a novel concept in the Maritime law respecting seaworthiness, wholly inconsistent with the doctrine laid down by this Court in *The Osceola,* 189 U. S. 158 and reiterated in *Mahnich* v. *Southern Steamship Co.,* 321 U. S. 96 and restated more recently in *Seas Shipping* v. *Sieracki,* 328 U. S. 85.

5. In the present decision the Court of Appeals has enunciated the rule that even though a ship was seaworthy in respect of the contractor's place of work at the time possession and control was turned over to the contractor, a question of fact may exist as to whether during the course of the work possession reverts to the shipowner so as to render the shipowner liable for a breach of the warranty of seaworthiness in respect of conditions not existing at the time the work was started. In this respect the decision of the Court in the present case is diametrically opposed to its earlier decisions in *Grasso* v. *Lorentzen,* 149 F. (2d) 127, Cert. den. 326 U. S. 743 and *Lynch* v. *United States,* 163 F. (2d) 97.

6. The questions presented are of tremendous importance to the steamship industry. The instant decision of the Court of Appeals has enlarged the potential liability of steamship companies to longshoremen who sustain injury far in excess of what was contemplated by *Seas Shipping* v. *Sieracki,* 328 U. S. 85. By that decision the traditional maritime doctrine of seaworthiness as to seamen was extended to longshoremen engaged in performing the traditional seamen's work, even though the vessel was moored in port and despite the fact that Congress, as a matter of public policy, has protected longshoremen with compensation benefits. The warranty of which the longshoreman was there given the benefit was that enunciated by this Court in *The Osceola,* 189 U. S. 158 and since consistently applied by this Court. The present decision renders the steamship owner liable for a breach of that warranty upon the same factual basis for which the steamship owner would become liable in negligence; but by imposing the liability on the basis of a breach of warranty, it deprives the steamship owner of the defenses which are available in a negligence action. Where workmen come on board ship to perform contract labor under conditions which maintain while the vessel

is in port, involving as it necessarily does, recesses in the continuity of the work, the present decision makes the shipowner liable for a new warranty each time work is resumed. The heavy monetary burden which such a principle of liability imposes on the shipping industry is readily apparent. The novelty of such a doctrine, its advance beyond prior established limits of responsibility, its far-reaching import, and its inconsistency with principles of liability enunciated in other Courts, it is respectfully submitted, requires the review of the present decision by this Court.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all the proceedings in the case numbered and entitled on its docket No. 22479, October Term, 1952, Anthony Mollica, Plaintiff-Appellee against Compania Sud-Americana De Vapores sued herein as "Chilean Line," also known as Sud-Americana De Vapores of Valparaiso, Defendant-Appellant, and that the decision of the said United States Court of Appeals for the Second Circuit in said case be reversed and that the complaint be dismissed and that your Petitioner have such other and further relief in the premises as may be just.

COMPANIA SUD-AMERICANA DE VAPORES,
Petitioner.

By: EDMUND F. LAMB,
Attorney.

Dated: New York, N. Y.
April 28, 1953.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I.

The decision herein of the Court of Appeals for the Second Circuit is in conflict with decisions of the Third Circuit and of the New York Court of Appeals, and is at variance with decisions of this Court and earlier decisions in the same circuit.

Almost simultaneously with the rendition of the opinion of the Court of Appeals for the Second Circuit herein, the Court of Appeals for the Third Circuit decided the case of *Lopez* v. *American-Hawaiian Steamship Co.*, 201 F. (2d) 418. The questions of law presented in the two cases are identical, the facts vary only slightly, but the results are in conflict. In both cases there was around the clock work by stevedores, a recess in the stevedores' work, inspection of the stevedores' work by a Mate before completion, and lack of adequate light. In *Lopez* v. *American-Hawaiian*, the Third Circuit ruled as a matter of law that custody and control of the hold where the plaintiff was injured, had remained in the stevedores. In both cases this question was viewed as the crucial issue. Thus the rule in the Third Circuit is what Chief Judge SWAN considers should be the rule herein in the Second Circuit.

The instant decision is also in conflict with earlier decisions of the same Court. In *Lynch* v. *United States*, 163 F. (2d) 97, the Second Circuit Court of Appeals had before it facts which far more strongly suggested that the ship had custody and control of a hold, than the facts here suggest, but the Court there ruled as a matter of law that the steamship owner was not liable, because the hatch was in the custody of the repair men. The repair men had started work at 1:00 P.M. and had moved part of the hatch cover, working until 5:00 P.M. when they knocked off. At 10:00

P.M. claimant, an employee of the repair yard, boarded the ship and worked until 3:00 A.M., when he attempted to go ashore. He crossed over No. 5 hatch, which was unlighted and which was not being worked and fell through an opening into the hold. Even though the ship's crew were on the ship, the Second Circuit Court of Appeals said:

> "From one o'clock that afternoon until the happending of the accident herein involved, Bethlehem was in control of all or part of the ship, including No. 5 hatch" (p. 98).

See also *Grasso* v. *Lorentzen,* 2 Cir., 149 F. (2d) 127 at 129 and *Guerrini* v. *United States,* 2 Cir., 167 F. (2d) 352 at 354.

As the sole basis for finding the ship herein to be unseaworthy the Court of Appeals has stated that the ship did not supply adequate light for *all* parts of No. 4 hold (R. 155), even though this naked issue was not submitted to the jury. The Court observes that there were on board the ship twenty-five sets of cluster lamps (R. 155) and concedes that it was the duty of the plaintiff and other stevedores to put these cluster lights where needed (R. 155, 156). No claim is made that the lights were defective or that the number on board the vessel was insufficient.

In holding the vessel herein unseaworthy, the decision is in direct conflict with the recent decision of the Court of Appeals for the Third Circuit in *Brabazon* v. *Belships Co.,* F. (2d) (decided March 26th, 1953, not yet officially reported) and with the decision of the New York State Court of Appeals in *Riley* v. *Agwilines, Inc.,* 296 N. Y. 402, where the Court held that a ship is not liable:

> ". . . because of the manner in which longshoremen carry on the work or because of their failure to use appliances furnished for their use, including lights available for lighting the tween decks or other parts of the ship where the work is done" (p. 407).

With an adequate number of lights on board there was no unseaworthiness of the vessel herein or its appurtenant appliances and equipment, and the decision herein, therefore, is in conflict with the decision of this Court in *Seas Shipping* v. *Sieracki,* 328 U. S. 85; *Mahnich* v. *Southern Steamship Co.,* 321 U. S. 96; and *The Osceola,* 189 U. S. 158.

The duty of a shipowner to furnish a seaworthy ship is absolute and cannot be delegated: *Seas Shipping* v. *Sieracki,* 328 U. S. at 95 and 100. To recognize that stevedores must place lights in a hold where needed (2 Cir. opinion R. 155, 156), *Riley* v. *Agwilines,* 296 N. Y. 402) is inconsistent with the statement that inadequate lights in a hold make a ship unseaworthy for loading. The distinction between unseaworthiness in regard to lights and negligence in failing to lay them out is tersely stated in the recent decision of the Third Circuit Court of Appeals in *Brabazon* v. *Belships Co.*:

> ". . . the duty of a shipowner in any case to provide a safe place to work, unlike the distinct if sometimes overlapping duty to provide a seaworthy vessel and appurtenances, is not absolute. Rather it is a requirement of reasonable care under the circumstances. . . .
>
> ". . . If the ship did not have an adequate supply of such appliances (portable cluster lights) in proper working order, this deficiency might well constitute unseaworthiness. Cf. *Read* v. *United States,* 201 F. (2) 758. And omission to supply lights as requested by the contractor might well be actionable failure to make the place of work reasonably safe.
>
> "Accordingly, we conclude that the negligent failure of the ship to supply needed lights was a responsible cause of Brabazon's injury and that the judgment of the District Court merits support on that basis."

Thus in the Third Circuit failure of the ship to supply an adequate number of lights is negligence, not unseaworthi-

ness, as it is in the Second Circuit under the present decision.

In *Seas Shipping* v. *Sieracki*, 328 U. S. 85, at page 93, this Court flatly denied that in unseaworthiness "the liability is founded in negligence", and in *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, at page 100, this Court stated that unseaworthiness does not rest "on the negligent failure usually by the seaman's officers or fellow seamen to supply seaworthy appliances." In the latter case this Court further said (at p. 103):

> "The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable."

In *The Osceola*, 189 U. S. 158, at page 175, this Court clearly indicated that unseaworthiness must be of the hull or its appurtenant appliances and equipment. The ruling, therefore, of the Court of Appeals herein, that the failure of the lampman (R. 156) to put out additional lights rendered the vessel unseaworthy, is in direct conflict with the decisions of this Court referred to above.

In holding that the ship herein was unseaworthy because No. 4 hold was inadequately lighted, the Court of Appeals rested its ruling on an obligation to furnish lights, which the ship had assumed by contract with the stevedores and in this regard, the decision of the Court of Appeals is in conflict with what this Court said in *Seas Shipping* v. *Sieracki*, 328 U. S. 85, at page 94, namely, that liability for unseaworthiness "is neither limited by conceptions of negligence or contractural in character. It is a form of absolute duty owing to all within range of its humanitarian policy."

The Court of Appeals herein has rested its decision on

unseaworthiness existing at the time plaintiff came to work at 7:00 P.M. It has not touched on the District Court's ruling (R. 136 (a)) that "it is no defense that the unsafe condition was created by the stevedores' employees after 8:00 A.M. when they first came aboard to assume control . . ." The Trial Court in its charge to the jury focused attention on the combination of a dangerously poised case in an inadequately lighted hold, as constituting unseaworthiness (R. 212 (a)). If the decision of the Court of Appeals herein is an expression of approval that the condition of the dangerously poised case created by the stevedores' employees, is no defense, then the decision is in conflict with other decisions of the Second Circuit Court of Appeals and with a decision of the Court of Appeals for the Third Circuit.

In *Lauro* v. *United States,* 2 Cir., 162 F. (2d) at page 34, the Court said:

> "If, therefore, the agents of the stevedore, while he is in such control, create an unsafe condition where none existed before, the shipowner is not liable for accidents resulting therefrom."

In *Lynch* v. *United States,* 2 Cir., 163 F. (2d) 97, the Court said, at page 98:

> "It is unnecessary to speculate whether the shipowner's duty to an employee of a contract repairman is less than or as great as that to the employee of a contract stevedore. For assuming it is as great, libellant cannot recover from the United States here. This follows because the dangerous condition, the unlighted open hatch, was caused by Bethlehem's employees after Bethlehem had assumed control of at least that part of the ship."

See also *Grasso* v. *Lorentzen,* 2 Cir., 149 F. (2d) 127 at 129; *Guerrini* v. *United States,* 167 F. (2d) 352 at 354.

In *Byars* v. *Moore-McCormack Lines,* 2 Cir., 155 F. (2d) 587 at 588, the Court said:

> "An employee cannot recover for injuries received while doing an act to eliminate the cause of the injury."

See also *Bruszewski* v. *Isthmian Steamship Co.*, 3 Cir., 163 F. (2d) 720 at 722, Cert. den. 333 U. S. 828.

Besides extending and enlarging the scope of the doctrine of *Seas Shipping* v. *Sieracki*, 328 U. S. 85, the Court of Appeals herein has adopted an innovation in the law by declaring "that a ship is unseaworthy for loading if, and when, adequate lights to make the work reasonably safe are lacking in the part of the ship being loaded" (R. 155). No support for this rule is cited and besides being in conflict with *The Osceola*, 189 U. S. 158 and *Riley* v. *Agwilines*, 296 N. Y. 402, it is in conflict with custom, practice and tradition, as stevedores of necessity furnish their own tools, lights and equipment, unless their contracts provide otherwise. There is no suggestion herein that the lights furnished were defective. A ship is not unseaworthy if it fails to make its winches, booms or other equipment available for use by the stevedores; only if the winches and booms, or other equipment offered by the ship for use by the stevedores, are defective, is the ship unseaworthy. *Brabazon* v. *Belships Co.*, 3 Cir. decided March 26, 1953, F. (2d) (not yet reported).

The Court of Appeals herein, as did the Trial Court, focuses attention on whether or not, custody and control of the hold reverted back to the ship during the recess between 6:15 P.M. and 7:00 P.M., and both seize upon the inspection by the Mate of the holds, as supporting the judgment herein (R. 156). This is in conflict with firmly established law. In *Herman* v. *City of Buffalo*, 214 N. Y. 316, the Court said at page 320:

> "The fact that the owner through an architect and superintendent of construction or other agent exercises a general supervision of the work and construction does not affect the rule of exemption from

> liability, where that is only for the purpose of assurance that the contract is being performed."

See also *Uppington* v. *City of New York,* 165 N. Y. 222; *Froelich* v. *City of New York,* 199 N. Y. 466 at 469; *Smith* v. *Brady,* 17 N. Y. 173.

Until the loading is performed to the satisfaction of the steamship owners, they do not accept it and they retain the privilege of rejecting it. If the work is improperly, defectively or dangerously performed, the stevedores loading a ship must correct the defect or danger, and that is what the plaintiff was doing when he was hurt in this case.

POINT II.

Because of its impact on industry the instant decision, which enlarges the doctrine of *Seas Shipping Co.* v. *Sieracki,* warrants review.

The principle enunicated in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, itself was an innovation. The soundness of the decision did not go unchallenged. Three Justices dissented and one did not participate. Mr. Justice FRANKFURTER, in dissenting, said at page 103:

> "The Court has thus created a new right in maritime workers, not members of the crew of a vessel, which has not hitherto been recognized by the Maritime Law or by any Statute. For this I can find no warrant in history or precedent, or any support in policy or practical needs."

There is neither a clear understanding as to what *Seas Shipping* v. *Sieracki* holds, nor uniformity in its application. In *Hawn* v. *Pope & Talbot, Inc.,* 3 Cir., 198 F. (2d) 800 and in *Read* v. *United States,* 3 Cir., decided February 4th, 1953, 201 F. (2d) 758, 1953 A. M. C. 314, the Court of Appeals for the Third Circuit in applying *Seas Shipping* v. *Sieracki*

has held a shipowner liable to a carpenter in the first case and to a repair man in the second, whereas in the Second Circuit, the Court of Appeals consistently has held that the duty of seaworthiness under *Seas Shipping* v. *Sieracki* applies only to a stevedore and not to repair men or other harbor workers.

Lynch v. *United States,* 163 F. (2d) 97;
Guerrini v. *United States,* 167 F. (2d) 352, cert. den. 335 U. S. 843;
O'Connell v. *Naess,* 176 F. (2d) 138;
Martini v. *United States,* 192 F. (2d) 649;
Rich v. *United States,* 192 F. (2d) 858.

In deciding *Seas Shipping* v. *Sieracki,* the majority of this Court had felt that the receiving by an injured longshoreman of Longshoremen's and Harbor Workers' Compensation Act benefits, as did the plaintiff herein (R. 13). should not deprive the longshoreman of the benefit of the shipowner's warranty of seaworthiness since the ship owner "is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost" (328 U. S. at p. 94). Thus consideration of the impact on industry of the doctrine of *Seas Shipping* v. *Sieracki,* and any extension of it must be considered herein.

Congress has protected longshoremen, but not seamen, by providing compensation insurance for them, 33 U. S. C. 901, et seq. It gave to seamen protection under the Jones Act, 46 U. S. C. 688, importing an extension of common-law negligence doctrines. While preserving to longshoremen third-party rights of action which previously existed and to seamen their traditional maritime rights, it has not seen fit to treat both classes of workers alike. If Congress were to consider anew whether to give longshoremen and harbor workers greater rights than it provided in the Compensation Act, it would be possible to submit evidence before

Congressional Committees of the impact on the maritime industry of that innovation. It would be possible to show that shipowners require stevedores and other harbor contractors to indemnify the shipowner against claims for death and personal injury to employees of the contractor. That the United States Government has led the way in this regard, would be apparent from its contracts [Compilation of Standard Contract Forms of the War Shipping Administration (U. S. Government Printing Office, 1945), called "Warshiprep" (Par. 11), "Warshipsteve" (Par. 8) and "Warshiplumpsumrep" (Par. 11)]"; *Amendola* v. *United States,* 74 F. Supp. 488; *Lo Bue* v. *United States,* 188 F. (2d) 800. In *Portello* v. *American Stevedores and United States,* 330 U. S. 446, still another form of Government contract was involved. It would be possible thus to show that the doctrine of *Seas Shipping* v. *Sieracki,* in its final effect, has operated to frustrate the will of Congress, which ordained in the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. 905:

> "§ 905. Exclusiveness of liability. The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependants, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

What this Court recently decided and said in *Halcyon Lines* v. *Haen Ship C. & R. Corp.*, 342 U. S. 282, seems to support this view.

It further could be demonstrated before a Congressional Committee that the harbor contractor suffers a staggering penalty when required to indemnify for liability imposed, not upon principles of negligence, but upon the principle of a shipowner's absolute non-delegable duty of seaworthiness. Statistics based on Court records could be produced to show the growing number of longshoremen and harbor workers who, like the plaintiff herein, after they obtain maximum benefits under compensation insurance, institute suit against the shipowner on the theory that they have everything to gain and nothing to lose. It could be shown that even at the current rate in New York for compensation insurance of $16.80 per $100 of payroll, one insurance company after another in the last eight years has stopped writing Longshoremen's and Harbor Workers' Compensation Act insurance, and that stevedoring companies are experiencing more and more difficulty in obtaining insurance; that for them to insure their liability under an indemnity contract is a monumental task. Underwriters, and even the New York State Insurance Fund, are unwilling to insure harbor contractors against liability assumed by contract, at any price. *Cardinal* v. *State of New York*, 304 N. Y. 400 at 405 and 418.

Thus stevedore contractors are caught between economic pressure exerted by shipowners on the one hand, and the haunting spectre of unlimited and uninsured liability under *Seas Shipping* v. *Sieracki* on the other.

Just as there is sharp dispute as to the soundness of this Court's decision in *Seas Shipping* v. *Sieracki*, there is serious question of the soundness of the attempted extension of that doctrine in this case. The dissent of Chief Judge Swan, the conflict with the decisions in the Third Circuit in *Lopez* v. *American-Hawaiian Steamship Co.* and

Brabazon v. *Belships Co.* and with the New York Court of Appeals in *Riley* v. *Agwilines,* and the conflict with earlier decisions in the Second Circuit, demonstrate an abundant need for review of the instant decision.

The Second Circuit Court of Appeals on at least one prior occasion has refused to extend the rule of *Seas Shipping Co.* v. *Sieracki,* saying in *Guerrini* v. *United States,* 167 F. (2d) 352 at 354:

> "At any rate it is proper if such an innovation is to be made, that it should await the sanction of the Supreme Court in the exercise of its function of supplying the inadequacies of the past."

So here, if ships henceforth are to be required to furnish lights or tools to stevedores loading a hold, under penalty of breach of warranty of seaworthiness, it seems that this Court should pass on the question. In an unseaworthiness case, liability attaches without fault and is not based on a finding of negligence of the ship's crew, although that also may be present. *Mahnich* v. *Southern Steamship Co.,* 321 U. S. 96, at page 99. In a negligence case, of course, the failure to use reasonable care and that alone, becomes the yardstick for measuring the defendant's liability. The issues for determination in the two types of cases necessarily must be different, yet in the instant case the Court of Appeals treated the issues as identical, saying:

> "The allowance of the amendment of the libel to permit the appellee to abandon negligence as the legal basis of recovery and put his reliance upon seaworthiness alone was no abuse of discretion. Even the need for such an amendment is doubtful for no additional issues of fact were raised thereby" (R. 20).

Contra *Fernandez* v. *United Fruit* (2 Cir.), 200 Fed. (2d) 414.

If the distinction between liability based upon failure to exercise reasonable care and liability without fault is to be obliterated, in a case involving the application of Maritime law, this Court alone should pronounce the doctrine. Otherwise, the lack of uniformity which *Seas Shipping* v. *Sieracki* has engendered will be aggravated further. This Court repeatedly has re-emphasized the need for uniformity throughout the Country in the Maritime Law since it said in *Workman* v. *Mayor,* 179 U. S. 552, 45 L. Ed. 314, at page 320:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, . . ."

See *Union Fish Company* v. *Erickson,* 248 U. S. 308, 63 L. Ed. 261; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 87 L. Ed. 239; *Engel* v. *Davenport,* 271 U. S. 33; and *Robbins Dry Dock & Repair Co.* v. *Dahl,* 266 U. S. 449.

The compulsion of our Constitution that the Maritime Law be uniform is no less when exercised on our several United States Courts of Appeal than it is when exercised on the Courts of the several States of these United States. The conflicts which we have pointed out between the decisions of the Court of Appeals for the Second Circuit and those of the Third Circuit, thus do not conform to the requirement of uniformity.

Even within the geographical limits of the State of New York in the administration of the doctrine of *Seas Shipping* v. *Sieracki,* we have conflicting interpretations. If we are in the New York State Supreme Court Building in Foley Square, New York, we are subject to the interpretation of the New York Court of Appeals in *Riley* v. *Agwilines,* 296 N. Y. 402, where the Court indicated it

would follow its own interpretation, not that of the Second Circuit Court of Appeals. In *Muscelli* v. *Frederick Starr Contracting Co.*, 296 N. Y. 330, the New York Court of Appeals refused to hold the owner of a vessel liable under *Seas Shipping* v. *Sieracki*, because the owner was not in possession of the vessel, whereas the Second Circuit in *Canella* v. *Lykes Bros.*, 174 F. (2d) 794, reached a contrary result albeit with a dissenting opinion by Judge CHASE, who there expressly refused to extend the *Seas Shipping* v. *Sieracki* doctrine.

If this were a suit involving Civil Law, the conflicts between the Circuits on several important rules applicable herein would permit Certiorari under Rule 38, sub. 5 (b). Since this case involves Maritime Law the demonstrated lack of uniformity seems to compel Certiorari.

CONCLUSION.

For the reasons stated it is respectfully submitted that the annexed petition for a writ of certiorari should be granted.

Respectfully submitted,

EDMUND F. LAMB,
80 Broad Street,
New York 4, N. Y.
Attorney for Petitioner.

VINCENT A. CATOGGIO,
of Counsel.

Dated: New York, N. Y.
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Supreme Court of the United States

October Term, 1952

No. 761

ANTHONY MOLLICA,

Plaintiff-Respondent,

against

COMPANIA SUD-AMERICANA DE VAPORES sued herein as CHILEAN LINE, also known as SUD-AMERICANA DE VAPORES OF VALPARAISO,

Defendant-Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION

JACOB RASSNER,
Attorney for Plaintiff-Respondent

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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Supreme Court of the United States

October Term, 1952

No. 761

ANTHONY MOLLICA,
Plaintiff-Respondent,
against

COMPANIA SUD-AMERICANA DE VAPORES sued herein as "Chilean Line", also known as SUD-AMERICANA DE VAPORES OF VALPARAISO,
Defendant-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 134-137) is reported at 107 Fed. Supp. 316. The opinion of affirmance by the United States Court of Appeals for the Second Circuit, and the dissenting opinion (R. 153-158) are reported at 202 F. (2d) 25. Petition for rehearing (R. 163) was denied on March 10, 1953 (R. 186).

Jurisdiction

Petitioner alleges jurisdiction on the provisions of 28 U. S. C. 1254 (Sec. 240 (a)) of the Judicial Code as amended.

Statement

The subject matter involved is nothing more nor less than a "garden variety" action by a longshoreman for injuries sustained in the course of his employment aboard a merchant vessel, by reason of unseaworthy conditions constituting an unsafe place wherein to work, which conditions preceded the start of work by respondent and his fellow-employees and were clearly within the control and responsibility of the petitioner herein.

Petitioner is asking this Court to accept such evidence as the jury refused to credit and to disregard the facts accepted by the jury and found sufficient by the Trial Judge and the majority of the United States Court of Appeals for the Second Circuit. It is most significant that the dissenting opinion is concerned with a difference of opinion as to the meaning of certain evidence as regards control, and is not at all concerned with a purported conflict between the circuits. In fact, there is no such conflict.

The S.S. Aconcaqua, owned and operated by a Chilean corporation, the petitioner herein, discharged a cargo of nitrates before it came to Pier 57, Brooklyn, New York. for loading (R. 3, 5, 34, 79, 80, 97, 151). This discharge was effected by a stevedore other than respondent's employer (R. 151). By reason of the dangers inherent in the holds of the vessel caused by the previous cargo of nitrates, the respondent prohibited the use of the permanent hatch lights for illumination when the longshoremen came to work in the lower hold of hatch number 4 (R. 79, 80).

At the time respondent came to work as a member of an extra gang, to load cargo in hatch number 4, at about 7:00 P. M., the weather reading was maximum for cloudiness and it had just stopped raining (R. 33, 139). The lower hold was dark. There were no lights but for one cluster lamp for the upper 'tween deck, that did not penetrate the

darkness below, where the respondent was assigned to work (R. 141, 142). The mast lights were not directed by the petitioner to the after portion of the lower hold where the accident occurred (R. 27, 28, 34).

Pasquale Esposito, a member of respondent's gang, testified that when he came to the vessel at 7:00 P. M. he was told by Paul Izzo, the hatch boss, to obtain lights to illuminate the lower hold (R. 140). He looked for the Mate, found a member of the ship's personnel who answered his request for lights by directing that the work proceed without the lights, to be supplied later (R. 140, 141). Thereafter, the witness conveyed this message to the hatch boss who commenced work in the lower hold (R. 141). Esposito noted that the lower hold was dark and that no loading from the dock took place before the accident involved herein (R. 141).

Paul Izzo, the hatch boss, corroborated Esposito's testimony that he needed lights for the dark lower hold, and that he was compelled to work without illumination (R. 141). That when he went below, he noted a case wedged in between the tunnel and another case (R. 19). This case out of position was supported by a cable or wire at the end away from respondent's station when he was injured, which case should have been supported by two wires (R. 20, 143).

Izzo then told the respondent to hold two dog hooks up against the underlaying case until the winchman would effect a strain on the cable attached to these hooks, at which time the respondent was to move away to a place of safety (R. 142). Izzo then went atop the hatch tunnel to signal the winchman, in which position he could not see the respondent because of the inadequate illumination (R. 17, 143). From the time Izzo first saw the case out of position until the time of the accident, no member of his gang touched the fall thereto attached (R. 143).

Izzo testified that he gave the winchman a hand signal to "go easy" and also gave a voice signal (R. 18, 25, 143).

Thereafter the underlaying case was caused to move and the wedged in case came down on respondent's left foot while he was holding the dog hooks awaiting a strain (R. 19, 24).

Izzo further testified that the longshoremen were not allowed to bring lights to the Chilean Line vessel, and that his gang had not loaded any cargo from the dock prior to the accident (R. 25, 143).

Joseph DiGiovanni, the winchman, testified that there was no illumination in the hold (R. 144). That he would have been able to see Izzo's hand giving a signal only if it were extended away from his body (R. 144). That he was unable to see the respondent (R. 145).

DiGiovanni heard the hatch boss say "Go ahead", he operated the winch and then heard "a 'Stop' holler. I don't know what was the matter because I couldn't see what was going on down * * * " (R. 27).

Mollica testified that he heard one of his gang ask for lights but that none were furnished. He descended into the hold after waiting on the deck for a few minutes (R. 34). That for this voyage of the vessel this was the first time his gang had been aboard (R. 35).

After descending respondent saw a case out of position in the after, off-shore side of the hold (R. 34). To move the underlaying case, respondent knelt while holding the dog-hooks and awaiting a strain on the cable. Instead of a slow strain, the operation of the winch caused the lower case to move suddenly, and the wedged in case came down on his heel (R. 36, 37). That if there had been adequate illumination the hatch boss would have been able to see the respondent in his position by the case (R. 41, 42). That he had been assigned by the hatch boss to the duty of holding the dog-hooks in position until the strain would secure them against the case (R. 43).

The deposition of Hernan Quevado was read in evidence. He had been produced on May 9, 1952, pursuant to an order of the Hon. John F. X. McGohey, dated March 4, 1952, which reads in part as follows:

> " * * * to give testimony * * * with respect to the custom and practice aboard said vessel in the furnishing of illumination to stevedores working in the holds thereof, and also as to the control of cargo in the No. 4 hatch of said vessel on August 18, 1949, before the plaintiff Anthony Mollica came there to work thereat * * * " (R. 145).

Quevado testified that he was the mate in charge of the S.S. Aconcaqua at the time of the accident (R. 68, 69). At the time of the deposition he was still employed by the petitioner herein (R. 66). His admissions as to the non-delegable duty of providing illumination, his responsibilty and control of the lower hold just prior to the accident, and his failure to make an appropriate log entry as to the accident and the circumstances involved as required by Chilean law, are as follows:

1. That before the accident on August 18, 1949, he had been inspecting the hatches "because at 7 o'clock come the gangs some more" (R. 68). That between 5 and 7 P. M., he had descended to the lower hold, as follows:

> "Q. You were down there? A. At that time I take a look at all the hatches. I go one by one to see the proper conditions of the stowage of the cargo.
>
> Q. In other words, you felt that you were responsible to see that it was in proper condition? A. Yes, I am the officer on duty.
>
> Q. You were responsible? A. Yes, sir * * * " (R. 87).

2. That the vessel was responsible for providing the lights for the longshoremen, and that none were brought by the longshoremen (R. 78). A member of the ship's personnel, the "lampman", was in sole charge of the lights and it was his job to set them up (R. 79).

3. That the stationary hatch lights were not turned on by the petitioner because there had been a cargo of nitrates in the hold which created danger of an explosion (R. 79, 80). These stationary lights could only be controlled by the lampman (R. 80).

4. That the law of Chile required an entry to be made in the log of the vessel as to any accident occurring thereon, including one to a longshoreman (R. 146). The witness knew that an accident had recently happened in the lower hold of number 4 hatch; that a case of cargo had come down on a longshoreman's heel, who was sufficiently injured to be taken off the vessel—but that he failed to make an entry in the log (R. 146, 147). The witness knew that the respondent's foreman, a Peter Hansen, was on the vessel, but failed to inquire as to the name of the injured longshoreman (R. 72).

Pedro Berea, a witness called by the petitioner, employed in the petitioner's new York office, and the acting interpreter for Quevado during his deposition, testified as follows: That the "lampman" of the S.S. ACONCAQUA at the time of the accident, also employed by the petitioner at the time of the deposition of Quevado on May 9, 1952, was in fact then in the Port of New York on the S.S. MAIPO, serving under Quevado. He was not called as a witness by the petitioner, nor was his deposition taken on May 9, 1952 while he was in New York, though the order of the Court referred to the "custom and practice abcard said vessel in the furnishing of illumination to stevedores working in the holds thereof" (R. 145).

The injury suffered by respondent to his left foot required a number of operations, including a triple arthrodesis of the foot; and the sole medical expert in the case testified that there is a strong possibility of eventual amputation, with a prognosis of a permanent loss of seventy to eighty per cent of respondent's leg (R. 147-149).

Argument

Petitioner erroneously states the issues that prompted the affirmance below, and overly presumes on page 4 of its petition that "it is conceded that at the time the longshoremen began work at 8:00 A. M., the No. 4 hold was in seaworthy condition".

In fact, the unseaworthiness preceded the start of work at 8:00 A. M. in at least two respects:

1. As expressed in the majority opinion below, as follows:

> "There were small ceiling lights in the No. 4 hold, but these were not turned on because of danger that they would cause the explosion of nitrate fumes, which remained in the hold from a cargo which had been recently discharged" (R. 154, 155).

2. As expressed in the District Court opinion below, as follows:

> "Moreover, the ship's responsibility for providing illumination bears upon the issue. That responsibility, during the prior daylight shift, might have no relevance; but during a period when an oncoming night shift was awaited, such responsibility may well be found to take on relevant significance" (R. 136).

This is considered in the majority appellate opinion below, as follows:

> "Although there was conflicting evidence on the subject, the jury could justifiably have found from the testimony that the lampman had not made cluster lamps available for use by the stevedores and that the absence of such a lamp or lamps in the No. 4 hold at the time of the accident so impaired the vision of the winchman that it was a contributory cause of the injury" (R. 155).

The concisely stated factual conclusions from the record, to which petitioner gives a strained and unwarranted interpretation in a desperate attempt to spell out a conflict of authorities, are as follows:

1. That before the first gang of longshoremen came to work at 8:00 A. M. the hold was unseaworthy, in that a cargo of nitrates improperly discharged elsewhere presented a dangerous condition and unsafe place to work, which a petitioner's witness testified did prevent the use of the stationary hatch lights for the illumination of the dark lower hold of hatch number 4 when respondent came to work at 7:00 P. M.

2. That respondent's extra gang of longshoremen, coming to work about one hour after the prior gang had left, were directed by a member of the ship's personnel to work in the dark lower hold without illumination, after lights had been requested by the hatch boss.

3. That the longshoremen were not allowed to bring lights to the vessel. It is admitted by the petitioner that it had the non-delegable and continuing duty of providing illumination for the longshoreman.

4. That the officer in charge, produced pursuant to a Court order to testify as to control of the hatch just prior

to the time the respondent came to work, admitted that he personally inspected the hold just before the second gang arrived, and that it was his responsibility to see that the cargo had been safely stowed.

5. That in fact there was a dangerously poised case of machinery which the officer in charge failed to see, correct, warn about, or provide sufficient illumination for its removal.

6. That the hatch boss and winchman performed the operation of moving the dangerously poised case of machinery without the benefit of illumination, while unable to see the respondent at his assigned duty of holding the dog-hooks in position until a strain on the cable would be taken, with the consequent premature moving of the underlaying case and the permanently disabling injuries to the respondent's foot when the wedged in case came down on his person.

7. That the petitioner tacitly admits fault by its failure to make an appropriate log entry as required by Chilean Law, and by its failure to call an essential witness in its control, the ship's "lampman".

POINT I

The decision below is clearly correct and consonant with the decisions of this Court and the Third Circuit.

Most of the cases cited by petitioner have been considered by the two Courts below, and their opinions are in conformity therewith. Though these decisions may be in conflict with the version of the facts which petitioner presents in almost complete disregard of the jury's findings of fact and the judicial acceptance as reasonable and properly predicated on the record herein, they have no contra application in the light of the true and accepted factual conclusions favoring respondent's cause.

Likewise, the two Third Circuit decisions which petitioner relies on most heavily, *Lopez* v. *American-Hawaiian Steamship Co.*, 201 F. (2d) 418 and *Brabazon* v. *Belships Co. Ltd., Skibs, A/S,* F. (2d) (not yet reported), are clearly distinguishable. In fact, the *Lopez* case, *supra,* was considered by the Appellate Court below on petitioner's unsuccessful application for rehearing.

In the *Lopez* case there was in fact a light switch readily accessible in the mast table, and on a factual basis, unlike the case of *Hawn* v. *Pope & Talbot, Inc.*, 198 F. (2d) 800, the Third Circuit held there was surrender of control to the stevedore by the shipowner (see R. 185). In the instant case the test of *Lauro* v. *U. S.*, 162 F. (2) 32, 34, was applied to hold that the unsafe conditions proximately causing or contributing to the accident pre-existed the time respondent came to work.

The Mate's unequivocal testimony that he was responsible for the safety of the stowage did not unreasonably present a question of fact as to control in the case at bar. There is no such binding admission in the *Lopez* case, *supra.*

Again, in the *Brabazon* case, *supra,* in the very part quoted by petitioner on page 12 of its brief in support of the within petition, the Third Circuit clearly underlines the difference by stating that a vessel without an adequate supply of lights in proper working order would be liable for unseaworthiness. In the instant case the lights were in the exclusive control of the vessel, not made available when requested, with a further element of dangerous nitrate fumes preventing the use of the permanent hatch lights. Lights that are locked away, or which can't be used because of a danger pre-existing the start of longshore work, constitute inadequate illumination and unseaworthiness.

The condition precedent to the application of law sought by petitioner is a finding of fact of complete divestment of control by the petitioner unto the stevedore. The District Court's opinion answers petitioner's contention in this regard, as follows:

> "I am of the opinion, on the basis of the above cited cases, that the issue of an independent contractor's control of a portion of a ship is a question of fact to be determined from the evidence, and that there was not such an absence of probative fact in this case to justify withdrawing the issue from the jury" (R. 135).

In *Guerrini* v. *U. S. A.,* 167 F. (2d) 352, L. Hand, *C. J.,* predicated his conclusion that control of an oily deck remained in the ship though shore employees worked thereat, as follows:

> "Indeed, as to the last (i.e. surrender of control to contractor), it appeared that an officer of the ship was on watch on that day; presumably he made his rounds including the deck" (p. 354 of 167 F. (2d)).

In the instant case there is no need to seek a presumption, as there is a binding admission by the third officer,

representing the petitioner in an examination before trial pursuant to a Court order, that he actually went below and was in a position to see the stowed cargo. It follows that he negligently failed to see the danger, accentuated by the inadequate illumination, and failed to correct the danger, or give warning to the respondent, or provide adequate illumination for the work.

Nor is petitioner's contention well taken that the petition herein should be granted on the purported authority of the *Brabazon* case, *supra,* to the effect that the failure of the ship to supply an adequate number of lights is negligence and not unseaworthiness. The basic practical difference between a cause predicated on negligence and one based on the branch of a warranty of seaworthiness is the element of notice. *Seas Shipping* v. *Sieracki,* 328 U. S. 85. Where there is a proven element of notice, as in the case at bar, it follows when relying solely on the warranty of seaworthiness, that "no additional issues of fact are raised thereby", as stated by the majority opinion below (R. 157).

Whether a condition or set of conditions constitute unseaworthiness is essentially a question of fact, to be resolved by the fact finding body.

> *State, Use of Johnson* v. *U. S. A.,* 165 F. (2d) 911, 914;
> *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, 98; 64 S. Ct. 455.

There is no case cited by petitioner which holds otherwise than the decisions below as regards control and unseaworthiness being issues to be resolved from the facts in the record.

The instant case reaffirms the position of this Court as expressed in the *Sieracki* case, *supra.* Petitioner would impose an unwarranted limitation on the doctrine therein

expressed on a set of facts less compelling than those in the case at bar.

In desperation petitioner would impose an assumption of risk as to unseaworthy conditions on a longshoreman who is hired solely to load and discharge cargo, and seeks to distort Constitutional and Congressional intent in complete disregard of the humanitarian scope of decisional and legislative law designed to protect ship-workers and impose liability for the failure to furnish said workers with a safe and seaworthy place wherein to work.

Clearly, there is no conflict between the Circuits, and petitioner's desperation does not convert a correct decision in a simple case into an important question of Federal law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACOB RASSNER,
Counsel for Plaintiff-Respondent.

ROBERT KLONSKY,
of Counsel and on Brief.